SUPREME COURT

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MICHAEL RODAK, JR., CLERK

No. 72-403

In the Supreme Court of the United States

OCTOBER TERM, 1973

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

JEANNE M. MURRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. In view of respondent's concession that equitable jurisdiction does not extend to the granting of interim injunctive relief to discharged federal employees in the absence of "unique and irreparable injury" (Resp. Br. 17), closer scrutiny of her complaint may be helpful.

Respondent in her complaint failed to allege any facts amounting to "unique and irreparable injury." She alleged only that she "may be deprived of her income for an indefinite period of time, and spurious and unrebutted charges against her may remain on the record" (App. 4).[1] There is nothing unique about this

[1] Respondent also claimed that she had *already* "suffered the embarassment of being wrongfully discharged in the presence of her co-workers" (App. 4). Such a claim of past injury affords no basis for interim injunctive relief.

alleged injury; it could be asserted by any discharged federal employee.[2] Moreover, if respondent succeeds upon administrative appeal, she will be reinstated with full back pay and given an opportunity to rebut the charges against her. In short, this is a routine case in which it is apparent on the face of respondent's complaint that she has an adequate remedy at law. For the reasons stated in our main brief (pp. 18-26), such a bare claim of injury, which could be made by any discharged federal employee, is not sufficient to invoke the equitable jurisdiction of a federal district court.

2. Respondent insists (Resp. Br. 11), however, that the district court properly reserved judgment on the factual issue of irreparable harm in order to make a prior determination, after a hearing, of the likelihood of respondent's success on the merits of her administrative appeal. This insistence requires further discussion of the precise nature of respondent's claim on the merits and of the administrative appeal to which she was entitled.

Respondent did not seek equitable protection of rights originating in the constitution or a statute. Her claim was simply that her discharge had not been effected in compliance with certain regulations (5 C.F.R. 315.805) of the Civil Service Commission. Whatever the rule should be

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[2] Respondent contended for the first time in the court of appeals that a temporary loss of income *might* result in her being unable to meet ongoing financial commitments (see Pet. App. 10a). The speculative possibility of such injury—even if alleged in the complaint—would be an inadequate basis for injunctive relief. But we believe that even a conclusive showing of temporary financial distress would also be inadequate: the essence of the government's position here is that, especially in view of the Back Pay Act, 5 U.S.C. 5596, a showing of mere disruption of financial well-being does not justify the exercise of equitable jurisdiction on behalf of a discharged federal employee.

with respect to interim injunctive relief in aid of constitutional or statutory rights (see Resp. Br. 23-26), the general administrative scheme is best served by restricting the ordinary discharged federal employee—who, like respondent, rests on rights ultimately created by regulation—to the remedies available and relief afforded under the regulations, with the opportunity for judicial review after exhaustion of those remedies. Thus, as we have argued above and in our main brief, respondent's complaint should have been dismissed.

Our contention here is similar to that upheld by this Court in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. There, the seven-month limitation on the power of the Interstate Commerce Commission to suspend rate increases was read, in the context of a comprehensive regulatory scheme, as depriving the courts of power to enjoin such increases pending a final Commission order. Here, the failure of Congress to grant the Civil Service Commission power to stay an empolyee discharge pending hearing and decision by the Commission similarly implies, in the context of the general administrative scheme governing federal employees, a like absence of power in the courts. See, also, *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800.

If however, this Court determines that the district court properly refused to dismiss the complaint, the Court should nevertheless note that the procedure followed by the district court was erroneous. The court, without evaluating the nature of the injury claimed by respondent, continued a temporary restraining order against her removal pending the presentation of oral testimony by respondent's supervisor with respect to the reasons for her discharge. This procedure was wrong for two separate reasons.

First, in order to minimize judicial interference with the operations of the federal employing agency, the court should have determined whether respondent had shown that she would suffer irreparable injury before subjecting a federal officer to cross-examination with respect to his official acts.

Second, the district court had no basis for requiring the oral testimony of respondent's supervisor. Respondent's administrative remedy was an appeal to the Civil Service Commission that would be heard on the basis of written submissions. 5 C.F.R. 315.806 and 772.304.[3] In determining the likelihood of respondent's success on that appeal, there was no occasion for the taking of oral testimony; at the very most, as the government stressed at the hearing before the trial judge (App. 38-39, 42-43), the district court should have reviewed only the documentary evidence that would be before the Commission on appeal. The order continuing the temporary restraining order pending the taking of oral testimony was therefore erroneous, whether or not some other form of interim injunctive relief may have been appropriate.

Respectfully submitted.

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NOVEMBER 1973.

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[3] Respondent does not challenge the validity of these summary procedures, which apply only to probationary employees.